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No. 91-998

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

v.

NADER E. SOLIMAN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether an office maintained by a self-employed person in his residence qualifies as his "principal place of business" under Section 280A of the Internal Revenue Code, 26 U.S.C. 280A -and the expenses related to that area of his home are therefore deductible in computing his taxable income - if the taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business.

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STATEMENT

With the exception of one statement, the facts of this case as set forth by the Commissioner in his Brief are adequately stated. However, the Commissioner's

Statement indicates that the Tax Court held the Respondent's home office to be his principal place of business even though he "performed his most important work [at Suburban Hospital]" (Commissioner's Brief 5). The Tax Court never made such a finding. The Tax Court expressly found that the activities conducted by Respondent at the hospitals and in his home office "were equally essential to a successful medical practice" (Emphasis added) (Pet. App. 20a).

SUMMARY OF ARGUMENT

Section 280A (c)(1)(A) of the Internal Revenue Code allows taxpayers a home office deduction when that office is their principal place of business. The Tax Court, as affirmed by the Court of Appeals,

has determined that Respondent's home office was his principal place of business based upon an analysis of all of the applicable facts and circumstances of the case. In making this determination, the Tax Court rejected the "focal point" test and established a new test for determining the location of a taxpayer's principal place of business. This new test is entirely consistent with the legislative history of Section 280A which clearly indicates that Congress enacted the statute to prevent typical employees from taking unjustified home office deductions. Those taxpayers at whom Section 280A was directed will continue to be denied home office deductions under the new "Soliman" test. However, independent contractors, such as Respondent, who would have been unjustly denied a home office deduction under the

"focal point" test, will now be permitted that deduction under the "Soliman" test.

ARGUMENT

RESPONDENT'S HOME OFFICE WAS HIS "PRINCIPAL PLACE OF BUSINESS"

A. The Activities Undertaken By Respondent In His Home Office And the Amount Of Time Spent In That Office Support the Decisions Of The Courts Below That Respondent's Home Office Was His Principal Place Of Business

In 1983, Respondent Nader E. Soliman ("SOLIMAN") was an anesthesiologist in private practice performing services at three hospitals, Suburban Hospital in Bethesda Maryland, Shady Grove Memorial Hospital in Rockville, Maryland and Loudon

Memorial Hospital in Leesburg, Virginia. He worked as an independent contractor and was not an employee of these hospitals. SOLIMAN, like most anesthesiologists, meets with and treats his patients only in a hospital. However, there is more to being an anesthesiologist than merely appearing in an operating room to put a patient to sleep. SOLIMAN conducts the business of being an anesthesiologist, so although his profession is anesthesiology, he is also a businessman. His business is providing anesthesia services to patients in hospitals. Like most businessmen, all that the public sees or is aware of is the brief point of direct contact and the actual performance of the skills -- in this case supplying anesthesia. Obviously, there is more involved.

Since SOLIMAN is a businessman, he must

perform all the day to day activities required to run a business. In order to remain in business a businessman must maintain his client base and secure new clients; records must be kept detailing services provided; bills must be made out, accounts collected and bank statements reconciled; he must keep current with trends and advancements in his profession as well as meet the requirements necessary to maintain his license to do business.

SOLIMAN was not provided with an office at any of the hospitals where he worked. As a result, one room of his three room apartment was used as an office. It contained standard office equipment and the only personal use made of the office was to balance his checkbook which combined his business and personal financial affairs.

The trial transcript contains 15 pages

of testimony by SOLIMAN describing the activities he must undertake in order to run his business (C.A. App. 10-24). In his home office, SOLIMAN kept records of all his previous patients in case they required information at a later time. He kept a daily log of patients treated, services performed, payments made and outstanding account balances. Detailed billing records were compiled and modifications and adjustments made based on the patient's age, physical condition and the emergency status of the surgery. This information was recorded in a patient log, copied and sent to a billing service. In this office, SOLIMAN corresponded with patients, surgeons and insurance companies. SOLIMAN was also contacted at this office by surgeons specifically requesting his services. In addition to his anesthesia

practice, SOLIMAN administered pain treatments to his own patients. These patients contacted him in this office. He then contacted the hospital to arrange for their admission. Also in this office were medical books, journals and video tapes. These were used not only to stay current with advancements in his profession but for reference in difficult cases.

In order to maintain his license to practice, SOLIMAN was required to complete 100 hours of continuing medical education every two years. SOLIMAN fulfilled this requirement through home study, spending two to three hours in his office to obtain each one hour of credit. In addition, one of the hospitals where SOLIMAN worked required him to give a monthly one hour lecture. SOLIMAN spent approximately two to three hours, in his office, preparing

for each lecture. Over all, SOLIMAN "spent an average of 2 to 3 hours a day working in his home office" (Pet. App. 14a).

Clearly, the importance of the above described activities cannot be overstated. They were indispensable. If SOLIMAN did not undertake the activities summarized above and detailed in 15 pages of testimony, he would be an anesthesiologist without any patients, without any income, and in two years' time, without a license to practice. Those activities had to be done. They were <u>essential</u> if SOLIMAN was to continue in the business of being an anesthesiologist. Based on the above factors, the Tax Court determined that SOLIMAN's "home office was his principal place of business" and he was therefore entitled to deduct his home office expenses pursuant to Internal Revenue Code Section

280A (Pet. App. 24a-25a).

B. Section 280A Permits The Deduction Of Home Office Expenses When a Taxpayer's Home Office Is His Principal Place Of Business

Section 280A initially provides that expenses attributable to maintaining a home office are not deductible. Thereafter, it sets forth exceptions to this rule in certain limited and specified circumstances. Among these circumstances are when the office is used exclusively and regularly (i) "as the principal place of business for any trade or business of the taxpayer"; or (ii) "as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business." In the case of an employee, these exceptions apply only if the office

is maintained for the convenience of his employer. The only circumstance applicable to SOLIMAN is Section 280A (c)(1)(A), the principal place of business exception.

In Baie v. the Commissioner, 74 T.C. 105 (1980), the Tax Court noted that "[n]othing in the legislative history of Section 280A or the Commissioner's regulations furnishes any guidance as to the scope of the 'principal place of business' concept in the context of section 280A. We therefore take it that what Congress had in mind was the focal point of a taxpayer's activities." 74 T.C. at 109. However, the Tax Court was never able to provide any basis for this conclusion as to Congressional intent.

The "focal point" test emphasizes "the place where goods and services are provided to customers and revenues are generated"

(Pet. App. 18a). As stated by the Tax Court, [u]nder this test, [SOLIMAN's] home office is not the 'focal point' of his business" (Pet. App. 18a). The Tax Court noted, however, that the Second and Seventh Circuit Courts of Appeals have questioned the "focal point" test. See Meiers v. Commissioner, 782 F.2d 75 (7th Cir. 1986), Weissman v. Commissioner, 751 F.2d 512 (2d Cir. 1984) and Drucker v. Commissioner, 715 F.2d 67 (2d Cir. 1982). "In light of this response, [the Tax Court proceeded] to revisit the 'focal point' test and [their] interpretation of Section 280A" (Pet App. 18a). Since there is no basis in the legislative history for the "focal point" test, the Tax Court reviewed the language of the statute and correctly concluded that

> Goods and services could be transferred to customers and clients in the taxpayer's home, the 'focal point,' only if the taxpayer meets

> clients or customers in his home. The 'focal point' test, therefore, merges the 'principal place of business' exception with the 'meeting of clients' exception and practically eliminates the principal place of business exception from section 280A. ... If the 'principal place of business' exception has meaning independent of the exception for home offices used to meet clients or patients, then the 'focal point' test should give way to an analysis of all the facts and circumstances. The determination of 'principal place of business' necessarily depends on the facts and circumstances of each case (Pet. App. 19a).

An analysis of the "facts and circumstances" caused the Tax Court to conclude that the activities undertaken by SOLIMAN in his home office were "essential" (Pet. App. 22a). The Court further found that "[h]e spent approximately 30 percent of his time in his home office ... [and] had no place to manage his medical practice other than in his home" (Pet. App. 23a). The Court then held "that [SOLIMAN's] home

office was his principal place of business, and we will no longer follow our opinion in Drucker v. the Commissioner, supra, [the 'focal point test'] in cases in which a taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business" (Pet. App. 23a-24a).

C. The Legislative History Of Section 280A Demonstrates That Congress' Overriding Goal In Enacting The Statute Was To Prevent Employees From Taking Unjustified Home Office Deductions

The Commissioner's effort to discredit the Tax Court's rejection of the "focal point" test and its establishment of the new "Soliman" test for the deductibility of home office expenses based upon the

legislative history of Section 280A and Congress' rejection of the "appropriate and helpful" standard is misleading. Congress enacted Section 280A and rejected the "appropriate and helpful" standard not as a result of abuses by independent contractors such as SOLIMAN, but because employees were deducting home office expenses "if the maintenance of the office [was] 'appropriate and helpful' to the employee's business." H.R. Rep. No. 658, 94th Cong., 1st Sess. 157 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 145 (1976); General Explanation of the Tax Reform Act of 1976, H.R. No. 10612, 94th Cong., 2d Sess. at 137.

Prior to the enactment of Section 280A, there were two Internal Revenue Code sections which governed the deductibility of home office expenses. Section 162

provided for the deduction of all ordinary and necessary expenses incurred in carrying on a trade or business. In Welch v. Helvering, 290 U.S. 111 (1933) and Commissioner v. Tellier, 383 U.S. 687 (1966), this Court defined "necessary" to mean "appropriate and helpful" to the taxpayer's business. "Ordinary" distinguished a capital improvement from a currently deductible expense.

Code Section 262 provided that no deductions were allowed for personal, living or family expenses. However, Regulation Section 1.262-1 (b)(3) provided that if a taxpayer used part of his house as his place of business, he could deduct an allocable portion of the home's expenses. There was no requirement that the taxpayer use that portion of his home "exclusively and regularly" for business

purposes, as is now required by Section 280A.

In a long line of cases, the Tax Court had held that the Section 162 ordinary and necessary standard should also apply to employees. (See Bischoff v. Commissioner, T.C. Memo 1966-102 [Par 66,102 P-H Memo TC], Gill v. Commissioner, T.C. Memo 1975-3 [Par 75,003 P-H Memo TC], Newi v. Commissioner, 432 F.2d 998 (2d Cir. 1970) and Rafferty v. Commissioner, T.C. Memo 1971-203 [Par 71,203 P-H Memo TC].) In these and similar cases, employees, who were provided with offices by their employers, were voluntarily taking work home with them and thereafter deducting what would otherwise have been personal living expenses. (The legislative history gives an example of a university professor who is provided with an office by his

employer but deducts expenses for the use of a den in his home to grade papers and prepare exams or class notes. H.R. Rep. No. 658, 94th Cong., 1st Sess. 160 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 147 (1976); General Explanation of the Tax Reform Act of 1976, H.R. No. 10612, 94th Cong., 2d Sess. at 139.)

In determining whether the home office expenses of these employees were deductible, the Court would review the applicable "facts and circumstances" and allow the deduction if the office was "appropriate and helpful" to the employee's job. Some employees were thereby allowed the deduction despite the fact that their employer provided them with an office at the job site. In so ruling, the Tax Court continually rejected the Commissioner's argument, as set forth in Revenue Ruling

62-180, 1962-2 C.B. 52, that an employee is entitled to a home office deduction only if he maintains the office as a condition of his employment. (See Johnson v. Commissioner, T.C. Memo 1972-192 [Par 72,192 P-H Memo TC at 985] where the Court stated that an "employee may deduct the expenses of an office in his home even though he is not 'required' to maintain one as a condition of his employment.") The legislative history also cites a case (Anderson v. Commissioner, T.C. Memo 1974-49 [Par 74,049 P-H Memo TC]) where the appropriate and helpful standard permitted the deduction of home office expenses by an investor who was not in the trade or business of making investments.

The legislative history of Section 280A criticizes the "appropriate and helpful" standard for allowing personal, living and

family expenses to be treated as business expenses. The legislative history states that "there is a great need for definitive rules to resolve the conflict that exists between several recent court decisions and the position of the Internal Revenue Service." H.R. Rep. No. 658, 94th Cong., 1st Sess. 160 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 147 (1976); General Explanation of the Tax Reform Act of 1976, H.R. No. 10612, 94th Cong., 2d Sess. at 139. The Court decisions to which Congress was apparently referring, and the only cases cited in the legislative history, involve employees and investors maintaining home offices. Both the legislative history and Revenue Ruling 62-180 succinctly demonstrate that home office deduction claims by independent contractors

was clearly not the Commissioner's overriding concern.

As enacted, Section 280A allows a home office deduction if the office is used exclusively and regularly as the taxpayer's principal place of business, the place where he meets with clients, or, in the case of a separate structure, an office used in connection with his business. The statute then specifically provides that in the case of an employee, the deduction is allowed only if the office is maintained "for the convenience of his employer." The Tax Court has defined that phrase in various ways, including the requirement that "the employee must maintain the office as a condition of his employment." Mathes v. Commissioner , T.C. Memo 1990-483 [Par 90,483 P-H Memo TC at 2309]. This is exactly the position argued for by the

Commissioner in virtually every case challenging an employee's right to a home office deduction. As a result of Section 280A, no longer would an employee be allowed to claim a home office deduction if it was merely "appropriate and helpful" for him to maintain that office.

D. The New "Soliman" Test For Determining a Taxpayer's Principal Place Of Business Is Entirely Consistent With The Legislative History Of Section 280A And Furthers Congress' Goal In Enacting The Statute

The Commissioner argues that in establishing the new "Soliman" test, the Tax Court is returning to the "appropriate and helpful" standard rejected by Congress (Commissioner's Brief 22). The only similarity between the "Soliman" test and

the "appropriate and helpful" standard is that a review of all of the facts and circumstances of the case is required in order to determine if the taxpayer was entitled to a home office deduction. However, Congress rejected the "appropriate and helpful" standard because it was being applied to employees who were already provided with offices by their employers. As the Tax Court correctly noted, if the principal place of business exception has meaning independent of the meeting with clients exception, an analysis of all of the facts and circumstances must be made.

Analyzing the pertinent facts and circumstances does not mean, however, that the deduction will now be allowed if maintaining the home office is merely "appropriate and helpful" to the taxpayer's business. Deductions which were allowed

under the "appropriate and helpful" standard (i.e., the university professor cited in the legislative history) will clearly be denied under the new "Soliman" test. There is nothing in the language of the statute or the contents of the legislative history which prevents or even discourages a Court from considering all of the facts and circumstances in determining the location of a taxpayer's principal place of business.

The Commissioner points out that the term "principal" as used in the "principal place of business" exception of Section 280A should be given its ordinary meaning, i.e., first, chief or foremost, and that when a taxpayer conducts business at multiple locations, a comparative analysis must be undertaken to determine which of those locations is the principal one.

However, the Commissioner is clearly incorrect in asserting that the Tax Court and the Court of Appeals failed to make this comparison.

The Commissioner cites Meiers, Weissman and Drucker where the appellate courts have determined the location of a taxpayer's principal place of business by comparing several factors, including the "length of time the taxpayer spends in the home office as opposed to other locations." Meiers v. the Commissioner , 782 F.2d 75, 79 (7th Cir. 1986). The Commissioner erroneously contends that this "time" comparison was not made by the Tax Court or the Court of Appeals (Commissioner's Brief 18).

The Tax Court did in fact make this comparison and found that SOLIMAN "spent more hours at the hospitals." The Court determined, however, that a "mechanical

comparison of" hours "can be meaningful [only] if the activities in the home office are similar to the activities at another place of business" (Pet. App. 23a and 21a). After reviewing the relevant facts of the case, the Court concluded that "[SOLIMAN's] business required him to perform two very different functions: (1) to render medical services at hospitals, and (2) to care for administrative chores, e.g., record keeping, gathering of billing information and payments, continuing medical education" (Pet. App. 20a). Therefore, the Tax Court stated "that comparing the number of hours spent at each location is a misleading comparison because the activities are so different from each other" (Pet. App. 20a). The Court then noted that its rejection of a "purely mechanical" comparison is

consistent with Proposed Treasury Regulation Section 1.280A-2(b)(3).

> The proposed regulations recognize that 'if an outside salesperson has no office space except at home and spends a substantial amount of time on paperwork at home, the office in the home may qualify as the salesperson's principal place of business.' The proposed regulations do not require more time to be spent in the home office than on the road. ... The proposed standard is spending 'a substantial amount of time on paperwork at home.' We agree with this standard if the taxpayer has no other available facility to accomplish the administrative chores of his business (Pet. App. 21a).

While the proposed regulation may not have precedential effect, the Tax Court was justified in referring to it in view of the absence of any legislative history defining principal place of business. In addition, the Court of Appeals noted that "the regulation does evince a policy to allow 'home office' deductions for taxpayers who maintain 'legitimate' home

offices, even if the taxpayer does not spend a majority of his time in the office" (Pet. App. 6a).

The Commissioner also mistakenly asserts that the Courts below failed to compare "the significance of ... the activities conducted at each place of business" (Commissioner's Brief 18). On the contrary, the Tax Court carefully considered the functions performed by SOLIMAN at the hospitals and in his home office and concluded that "[b]oth functions were equally essential to a successful medical practice" (Pet. App. 20a).

As stated above, the legislative history of Section 280A provides no guidance as to the meaning of the phrase "principal place of business." All that the legislative history discloses are the

reasons why that phrase was considered important. Therefore, it is the job of the Courts, not the Commissioner, to make the necessary interpretation. The Tax Court, as affirmed by the Court of Appeals, has now made that interpretation. The language of the Soliman decision provides guidance to future courts for application of the three point "Soliman" test, and the following are the factors which must be considered by future courts when determining the location of a taxpayer's principal place of business:

1. The amount of time spent at the various business locations. If the taxpayer performs similar functions at each place of business, a "mechanical comparison of the number of hours spent" at each location is appropriate (Pet. App. 23a). However, in cases where the

taxpayer "has no other available facility to accomplish the administrative chores of his business," no comparison of hours is undertaken (Pet. App. 21a). Instead, the taxpayer must satisfy the "substantial amount of time" test of Proposed Regulation Section 1.280A-2(b)(3) (Pet. App. 21a).

2. The relative importance of the functions performed at the various business locations. A taxpayer will be entitled to a home office deduction only if the activities performed there are at least as important to his business as the activities performed at the other business locations. This requirement can be inferred from the Tax Court's express finding that SOLIMAN's office and hospital "functions were equally essential to a

successful medical practice" (Pet. App. 20a).

3. Additional factors to be considered. In determining a taxpayer's principal place of business, a court should also consider the "business exigencies for having a home office, whether the functions performed in the home office are essential to the conduct of the business, whether the office is suitable for the essential business functions performed there, and the appropriateness of the furnishings" (Pet. App. 22a).

The "Soliman" test is as easy to apply as any facts and circumstances test. Facts must be analyzed and subjective determinations made. Such an analysis is no different than that required to apply most provisions of the Internal Revenue

Code, and is no more subjective than the "focal point" test was itself.

E. The Commissioner's Criticism Of The "Soliman" Test Is Misplaced

In criticizing the third rung of the "Soliman" test (lack of other available office location), the Commissioner notes that similar language was included in the Senate's version of Section 280A (Commissioner's Brief 14) which was rejected in the conference committee's final version of the statute (S. Rep. No. 1236, 94th Cong.,2d Sess. 435 (1976). The inference sought to be drawn from this reference to the legislative history is entirely misleading. The rejected provision would have allowed home office deductions to be claimed by <u>employees</u> who were not provided with offices by their employers (S. Rep. No. 1236, 94th Cong.,2d

Sess. 435 (1976). The clear intent of this provision was to once again prevent <u>employees</u> from taking unjustified home office deductions, since by including that provision, the Senate was ensuring that employees who <u>were</u> provided with offices by their employers would be denied the home office deduction. Why this provision was rejected by the conference committee is unclear. Perhaps they felt that the "convenience of the employer" requirement would adequately solve the problem and thereby render the additional provision redundant. In any event, contrary to the Commissioner's contention, the Courts below <u>are not</u> making the "unavailability" of an office an additional exception to the general disallowance rule of Section 280A. What the Courts have done is merely include "unavailability" as a factor in

their analysis of a taxpayer's principal place of business.

In a misplaced attempt to convince this Court that the decisions below will have a significant effect on the nation's tax revenues, the Commissioner claims that a teacher "who lacks effective after-hours access to school facilities could contend that he is entitled to deduct the expenses of maintaining [a home office] ... even though in terms of both time and importance the teaching profession is centered in the classroom" (Commissioner's Brief 28, Note 20). This assertion is without merit.

Teachers in general are employees of the schools for which they work. As such, they are provided with office facilities to perform the activities required by their jobs. The fact that they may not

have access to that office "after-hours" is irrelevant. Though the Tax Court spoke in terms of a taxpayer not having an "available" office location (Pet. App. 24a), there is no justification for implying that a home office deduction could now be claimed merely because a taxpayer does not have convenient, twenty-four hour access to his employer-provided office. In addition to failing the "availability" test, teachers, as employees, would only be entitled to claim a home office deduction if the office is maintained as a condition of their employment. Few if any school systems have such a requirement.

The Commissioner claims that the Tax Court erroneously distinguished Pomarantz v. the Commissioner, 867 F.2d 495 (9th Cir. 1988) by finding that Dr. Pomarantz

"'spent an insubstantial amount of time in his home office'" (Commissioner's Brief 27). As the Commissioner is aware, the Tax Court is obligated to follow only decisions of the appellate court to which the case in question is appealable. Golsen v. the Commissioner, 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971). Nevertheless, in Pomarantz, the only specific findings of fact on this issue were that Dr. Pomarantz "worked from 33 to 36 hours per week at the hospital" and "spent 150-250 hours per year reading publications" in his home office. Pomarantz v. the Commissioner, 867 F.2d 495, 495 (9th Cir. 1988) In comparison, SOLIMAN "spent 30 to 35 hours per week at the hospitals" and "an average of 2 to 3 hours a day working in his home office"

(Pet. App. 14a). The Tax Court justifiably distinguished Pomarantz.

In arguing that SOLIMAN's home office was not his principal place of business, the Commissioner refers to the "nerve center" vs. "place of operations" test which is used to determine a corporation's principal place of business for diversity purposes (Commissioner's Brief 19, Note 12). The "nerve center" test "places chief emphasis on the locus of a corporation's administrative and executive decision-making." The "place of operations" test focuses "on where a corporation carries on the bulk of its operational and production activities. ... The 'nerve center' test seems appropriate only where a corporation is engaged in multi-state activities in offices and plants located in different states."

Arbee Mechanical Contractors, Inc. v. Capital Sun Corporation, 683 F.Supp. 144, 146, 147 (E.D. Va. 1988). As noted by the Commissioner (Commissioner's Brief 19, Note 12), there is no indication that the Tax Court in any way based its ruling on a diversity of jurisdiction analysis. Nevertheless, since SOLIMAN engaged in the practice of medicine in both Maryland and Virginia, applying the "nerve center" test is not inappropriate. Under that test, SOLIMAN's principal place of business is located at his home office, the "administrative and decision-making" headquarters of his medical practice.

The Commissioner asserts that the decisions below "would vastly expand the class of taxpayers eligible to claim a deduction for 'home office' expenses" (Commissioner's Brief 28). Such expansion

is appropriate only for independent contractors who were unable to deduct what were otherwise legitimate home office expenses because they failed to satisfy the "focal point" test. Suggestion of any other large class of taxpayers is misleading. Only a select group of taxpayers, in circumstances comparable to those of SOLIMAN, will be entitled to take advantage of the rulings below.

Since the Tax Court's decision was issued, subsequent Court opinions indicate no difficulty whatever in applying the "Soliman" test to various facts and circumstances. In fact, taxpayers have been denied home office deductions in at least four cases which cite the Tax Court's Soliman decision. Two of these cases, Mathes v. Commissioner, T.C. Memo 1990-482 [Par 90,482 P-H Memo TC] and

Cadwallader v. Commissioner, 919 F.2d 1273 (7th Cir. 1990) involved university professors who were denied home office deductions because their employers provided them with on-campus facilities. See also Shore v. Commissioner, T.C. Memo 1990-271 [Par 90,271 P-H Memo TC] and McDonald v. Commissioner, T.C. Memo 1991-53 [Par 91,053 P-H Memo TC].

Despite the Commissioner's repeated references to the efforts at analysis undertaken by the Courts in Weissman, Drucker, and Meiers in determining which location was the taxpayers' principal place of business, the Commissioner appears to disregard the actual holdings of those cases and their succinct criticism of the "focal point" test. There is simply no justification for reversing the Court of Appeals and

reinstating the "focal point" test. The "Soliman" test is entirely consistent with the legislative history of Section 280A and furthers the goals that were sought by both Congress and the Commissioner under that statute. Congress and the Commissioner rejected the use of an "appropriate and helpful" analysis because under it, typical "nine-to-five" employees were deducting home office expenses. There is no valid reason for objection to the use of a facts and circumstances analysis with the built-in safeguards provided by the "convenience of the employer" requirement and the comparisons mandated by the "Soliman" test.

As structured by the Tax Court, the "Soliman" test, properly applied, will produce results fair to both the taxpayer and the Commissioner. Conversely, the

"focal point" test clearly leads to unjust and illogical results. As stated by the Tax Court in Wicker v. Commissioner, T.C. Memo 1986-1 [Par. 86,001 P-H Memo TC]

> The surgeon in private practice, operating at the hospital, may in the very narrowest sense earn all his fees in the operating room but he cannot conduct his private practice out of his hip pocket or from a pay telephone down the hall from the operating room. The attorney who confines his practice to litigation may, in the narrowest view, earn all his fees in the courtroom, prosecuting or defending his clients' cases, but he cannot be expected to maintain his practice from the counsel table, or out of the briefcase under his arm. We would not hold that either of those professionals had their "principal place of business" in the operating room or courtroom, respectively... We accordingly have no difficulty in finding that [petitioner's] home office was her principal place of business, in which a substantial part of her work was performed.

Wicker, T.C. Memo at 86-4-5.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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